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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL MEDICAL ENTERPRISES, INC.,
Petitioner,

vs.

DAVID K. BLEASDELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a discharged employee in an employment discrimination case must show *both* that the reason for his termination was false *and* that discrimination was the real reason for his termination in order to establish pretext to survive the employer's motion for summary judgment. In other words, is *pretext-plus* the proper standard for summary judgment under the *McDonnell Douglas* burden-shifting analysis?

Whether a former supervisor's disagreement with an employer's decision to terminate an employee creates a triable issue of fact as to whether the employer's stated reasons for the employee's termination were false, where the former supervisor does not refute the facts in the case.

RULE 29.6 LISTING

National Medical Enterprises, Inc. ("NME"), has no affiliates, parents or subsidiaries that have publicly issued shares. However, NME has formally changed its name to Tenet Healthcare Corporation, the shares of which are publicly traded.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

National Medical Enterprises, Inc., *Petitioner*,

vs.

David K. Bleasdell, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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National Medical Enterprises, Inc. ("NME"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is unreported. The opinion of the district court (App., *infra*, 14a-44a) is also unreported.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on September 11, 1997. NME's Petition for Rehearing was denied, and its suggestion for rehearing en banc was rejected, on November 7, 1997. (App., *infra*,

45a-46a.) The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISION INVOLVED

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides, in pertinent part, that "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

STATEMENT OF THE CASE

A. Relevant Facts

This action involves a terminated employee's claim for age discrimination. Respondent David K. Bleasdell ("Bleasdell") was employed by NME as a corporate pilot in NME's Aviation Department. Bleasdell was hired in August 1980, at the age of 42. After some time with NME, Bleasdell became a Pilot-in-Command, thus having final authority for flying and landing very sophisticated and expensive aircraft. (ER 20, Declaration of Walter Kraujalis ("Kraujalis Decl."), ¶ 4; SER 60, Deposition of David K. Bleasdell ("Bleasdell Depo"), pp. 161-65.) As a Pilot-in-Command, it was critical for Bleasdell to have the unwavering confidence and trust of the NME executives who flew with him. (SER 60, Bleasdell Depo, pp. 161, 163-65.) However, over a period of eighteen months prior to Bleasdell's termination, Bleasdell was involved in a series of incidents that caused NME management to lose confidence and trust in his abilities and judgment.

On July 5, 1990, Bleasdell was the Pilot-in-Command of a flight that nearly crashed on landing when Bleasdell failed to immediately take control of the aircraft, as he could have done, from the subordinate pilot who was flying the plane and had lost control. (SER 60, Bleasdell Depo, pp. 273-82, 290.) In April 1991, Bleasdell was again Pilot-in-Command on a flight that nearly crashed when he landed the plane too hard, causing it to bounce off the runway and forcing him to abort the landing. (SER 60, Bleasdell Depo, pp. 294-96; ER 20, Kraujalis Decl., ¶ 5.) Richard Eamer, the chairman of the board and chief executive officer of NME, was a passenger on the April 1991 flight. When Eamer asked what had happened, Bleasdell lied about the cause of the near-crash: rather than admitting that it was his fault, Bleasdell falsely stated that something had blown across the runway. (SER 60, Bleasdell Depo, pp. 296-97.) Eamer later found out that he had been lied to by Bleasdell. In addition, in September 1991, Eamer overheard Bleasdell lying to the head of NME's travel department about how late he had arrived at the airport for a flight.[1] As a result of these episodes, Eamer had lost all confidence in Bleasdell's abilities and judgment.

Bleasdell's supervisor at the time of these incidents was Robert Metz, the manager of the Aviation Department. Even though Metz was well aware of each of the above occurrences, he failed to discipline Bleasdell in any way. Metz admits that the near-crash incidents did occur and that,

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[1] Bleasdell contends that Eamer is partially deaf and, as such, he may have been mistaken about this particular incident. However, the only fact that is germane to this action is undisputed: Eamer believed Bleasdell was lying.

during the first incident, Bleasdell "could have taken control . . . a few seconds sooner than he did." (ER 32, Declaration of Robert Metz ("Metz Decl."), ¶¶ 13, 20, 23, 24.) Metz also admits that Bleasdell lied to Eamer about one of the near-crashes. (ER 32, Metz Decl., ¶ 14.) However, Metz disagreed that the actions taken by NME in terminating Bleasdell were warranted. (ER 32, Metz Decl., ¶ 44.) As a result of these problems, and in an effort to improve the overall quality and safety of the Aviation Department, Eamer demoted Metz and promoted Walter Kraujalis to the position of Aviation Department manager.

In January 1992, after evaluating the Aviation Department personnel, Kraujalis terminated Bleasdell for his role in the two near-crashes and for the aforementioned acts of dishonesty; Kraujalis felt that Bleasdell could not be trusted to exercise good judgment in critical cockpit situations or to honestly report events concerning aircraft and passenger safety. Along with Bleasdell, who was now 52 years old, NME terminated three other Aviation Department employees: the 42-year-old co-pilot who was involved in the first near-crash, a 24-year-old maintenance assistant, and a 28-year-old flight attendant. Bleasdell was replaced by Walter Huestis, then 46 years old, who was a former naval pilot who had previously been responsible for transporting high ranking government officials. (ER 20, Kraujalis Decl., 13.)

In his complaint, Bleasdell contends that he was discriminated against because of his age. However, Bleasdell admits that he never heard any NME supervisors make any statement reflecting a bias against older persons. (SER 60, Bleasdell Depo, p. 169.) Furthermore, Bleasdell does not dispute that the near-crashes occurred, or that he

lied to Eamer on one occasion, and was believed to have lied on another. Other than his own declaration, the only evidence that Bleasdell offered in opposition to NME's motion for summary judgment was the declaration of Metz, his former supervisor who had been demoted for his handling of the mishaps in question. Like Bleasdell, Metz offered his opinion that he disagreed with NME's decision to terminate Bleasdell, but more importantly, he also did not dispute the occurrence of the incidents that formed the basis of NME's decision. In other words, Bleasdell presented no evidence that NME's reasons for his termination were false, or that NME discriminated against Bleasdell due to his age.

B. Procedural History

On January 14, 1994, Bleasdell filed his original complaint in California Superior Court in Los Angeles County. Bleasdell filed his first amended complaint on or about March 11, 1994, alleging claims for (1) age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, (2) violation of public policy, (3) breach of contract, and (4) breach of the covenant of good faith and fair dealing. On March 29, 1994, the first amended complaint was removed to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1331 based on the federal question posed by Bleasdell's ADEA claim.

On October 31, 1994, NME filed its Motion for Summary Judgment. After allowing Bleasdell significant additional time for discovery, the district court granted the motion on August 28, 1995, and entered judgment dismissing Bleasdell's action in its entirety.

On September 11, 1997, a split panel of the Ninth Circuit reversed the grant of summary judgment on the ADEA claim.[2] On November 7, 1997, a split panel of the Ninth Circuit rejected NME's petition for rehearing and/or rehearing en banc. NME invokes the jurisdiction of this Court under 28 U.S.C. §§ 1254(1) and 2101(c).

REASONS FOR GRANTING THE PETITION

This case presents the frequently debated issue of what is the appropriate standard for a plaintiff to establish pretext and defeat an employer's motion for summary judgment in an employment discrimination case.[3] This

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[2] The summary judgment was affirmed as to the employment contract claims.

[3] This topic has been the subject of numerous articles, which have discussed the split in the Circuits and the need for Supreme Court review. See, e.g., Thomas Duley, Comment, *Summary Judgment and Title VII After Hicks: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. Davis L. Rev. 261 (1994); *Developments in the Law - Employment Discrimination, Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579 (1996); Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251 (1994); Julie Tang & Hon. Theodore M. McMillian, *Eighth Circuit Employment Discrimination Law: Hicks and its Impact on Summary Judgment*, 41 St. Louis U. L.J. 519 (1997); Tim D. Gray, Note, *Employment Discrimination: Summary Judgment and Rule 301 After St. Mary's Honor Center v. Hicks*, 15 Miss. C. L. Rev. 217 (1994); Richard T. Seymour, *Summary Judgment Motions After Hicks*, C874 ALI-ABA 167 (1993); Robert B. Fitzpatrick, *Burden of Proof in Post-Hicks Cases*, SC08 ALI-ABA 1483 (1997); Edward T. Ellis, *Employment* (continued...)

issue arises in the context of the *McDonnell Douglas* tripartite burden-shifting framework, which was devised by the Supreme Court as a means of dealing with employment discrimination cases where a plaintiff has only indirect evidence of discrimination. Under this framework, a discharged employee has the burden of showing a prima facie case of discrimination, at which point the burden shifts to the defendant employer to produce evidence of a legitimate, non-discriminatory business reason for the termination. Once a reason has been articulated, the burden is on the plaintiff to establish that the reason provided by the employer is merely a pretext for unlawful discrimination.

It is at this juncture that the Circuit Courts of Appeal have diverged: how does an employee establish pretext.[4] Several Circuits have adopted the "pretext-plus" approach, whereby an employee must show *both* that the reason for his termination was false *and* that discrimination was the real reason for his termination. Other Circuits have embraced the "pretext-only" approach, which allows a plaintiff to show *either* the falsity of the employer's reason

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[3](...continued)
Discrimination Litigation in the Federal Courts of Appeals After St. Mary's Honor Center v. Hicks, SC08 ALI-ABA 663 (1997).

[4] *See Developments in the Law - Employment Discrimination, Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579, 1590 (1996) [hereinafter *Shifting Burdens*] ("The greatest development (and controversy) has been at the pretext stage: whether the plaintiff's exposure of the defendant's explanations as pretextual constitutes a finding of discrimination, or whether the plaintiff must show pretext 'plus' affirmative indicia of discriminatory animus.").

or that discrimination was the real reason. Additionally, some courts have gravitated towards a middle ground, the so-called "pretext-maybe" approach, which gives the court latitude to consider the facts of the case.

This issue of which standard to apply was seemingly resolved by the Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993), in which "pretext-plus" was definitively adopted as the proper approach. However, the Circuits that followed pretext-only before *Hicks*, including the Ninth Circuit here, have continued to do so by arguing that dictum in the *Hicks* opinion suggests that pretext alone could be sufficient.[5] Courts have also found a way around the Supreme Court's pronouncement by arguing that *Hicks* only addresses the burden at trial, not summary judgment. As a result, numerous post-*Hicks* decisions demonstrate that a serious conflict still exists among the various Circuits as to this issue of extreme national importance, and guidance from the Supreme Court is necessary.[6]

The Ninth Circuit is one of several Circuits that has ignored the Supreme Court's pronouncement in *Hicks*. In a split decision, the Panel below held that "Bleasdell presented sufficient evidence to create an inference that the reasons given by National Medical to justify its decision to terminate Bleasdell were pretextual." (App., *infra*, 8a.) In

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[5] *See Shifting Burdens, supra* note 4, at 1593.

[6] In addition to the inter-Circuit conflict, there is also considerable intra-Circuit division on this issue. See discussion, *infra*, for a breakdown of the various positions taken by the Circuit Courts of Appeal.

so holding, the Panel adopted the pretext-only approach: "in order to survive summary judgment, the plaintiff 'must produce enough evidence to allow a reasonable fact finder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one.'" (App., *infra*, 6a (citing *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996)) (emphasis in original).) Therefore, certiorari should be granted to address the Ninth Circuit's express rejection of the pretext-plus standard mandated by the Supreme Court, as well as the conflict among the various Circuits on this issue. This case is an ideal vehicle for a Supreme Court pronouncement on this issue because it demonstrates the utility of the *Hicks* pretext-plus standard, as well as the concurrent futility of pretext-only. Here, the evidence of pretext is so flimsy, that it would be absurd to allow the matter to go to trial absent some evidence of discriminatory animus (the so-called "plus" in pretext-plus). To hold otherwise would virtually eliminate the summary judgment motion as a judicial tool for preventing meritless actions from proceeding to trial. Without pretext-plus, there would be a rash of trials in employment discrimination cases where there is no evidence of discrimination.

Another issue presented by this case, which requires resolution by the Supreme Court, concerns the weight that should be accorded to the testimony of a supervisor who disagreed with the employer's decision to terminate the employee. Such testimony should not create a triable issue of fact, particularly where the supervisor himself was disciplined for failing to take proper action against the terminated employee. In finding a triable issue of fact under its pretext-only approach, the Ninth Circuit relied solely on the testimony of Bleasdell's former supervisor,

Metz, who did not dispute the occurrence of any of the aforementioned incidents; he merely opined that termination was not warranted for the infractions. Furthermore, Metz was demoted following his failure to discipline Bleasdell for the near-crashes and for lying to the CEO. The Ninth Circuit's decision conflicts with sound case law from the Seventh Circuit, which holds that a supervisor's disagreement with an employer's decision does not create a triable issue unless the supervisor refutes the specific facts in the case. The Ninth Circuit's finding of pretext here lowers the bar to a such a degree that every plaintiff in an employment discrimination case will be able to clear it and proceed to trial.

I. Review By The Supreme Court Is Necessary Because Of The Conflict Among The Circuits Following The Supreme Court's Decision In *St. Mary's Honor Ctr. v. Hicks.*

The important national question of whether "pretext plus" is, in fact, the proper standard to apply in employment discrimination cases was addressed by the Supreme Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). In analyzing the proper application of "pretext," the Supreme Court in *Hicks* stated unequivocally as follows: "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515, 113 S. Ct. at 2752 (emphasis in original).

However, despite the Supreme Court's express mandate, the Ninth Circuit here specifically rejected "pretext plus," following the Ninth Circuit's decision in *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996),

cert. denied, 118 S. Ct. 369 (1997). The *Nidds* court used the following rationale as justification for ignoring the *Hicks* edict:

> At trial, [plaintiff] must prove "*both* that the [employer's alleged] reason was false, *and* that discrimination was the real reason." [citing *Hicks*.] However, if [plaintiff] persuades the jury that the defendant's alleged reason is false, then "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . together with the elements of the prima facie case . . . will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required*." [citing *Hicks*.] Thus to survive summary judgment, [plaintiff] is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude--based on [plaintiff's] prima facie case *and* the factfinder's disbelief of [defendant's] reasons for discharge--that discrimination was the real reason for [plaintiff's] discharge.

Nidds, 113 F.3d at 918 n.2 (emphasis in original). The Ninth Circuit's use of the seemingly contradictory language from *Hicks* is unavailing because the Supreme Court anticipated and rejected the argument:

> [T]here is nothing whatever inconsistent between [these statements]. Even though

> . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

Hicks, 509 U.S. at 511 n.4, 113 S. Ct. at 2749 n.4 (emphasis in original). In other words, a court can still determine, as a matter of law, that there is insufficient factual support for a *finding of discrimination*, even where there is sufficient evidence that the employer's stated reasons were false. This reading of *Hicks* finds support in the decisions of several Circuit Courts of Appeal. However, other Circuits have gone the other way and relied on the arguably inconsistent *Hicks* dictum to cling to the disfavored pretext-only approach.[7] Obviously, the Ninth Circuit is not alone in its misapplication of *Hicks*. The Circuits break down as follows:

First Circuit (Pretext-plus)

> The First Circuit has held that
>
> In the context of a summary judgment proceeding, *Hicks* requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before

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[7] "The circuits are split on the question of what evidence is sufficient to create a triable issue of intentional discrimination when the employer produces evidence of a legitimate business reason for the discharge." Thomas Duley, Comment, *Summary Judgment and Title VII After Hicks: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. Davis L. Rev. 261 (1994)

> becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age. **"Direct or indirect evidence of discriminatory motive may do, but 'the evidence as a whole . . . must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus.'"**

LeBlanc v. Great American Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993) (emphasis added) (citations omitted), *cert. denied*, 511 U.S. 1018, 114 S. Ct. 1398 (1994); *see also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 262 (1st Cir. 1994) (holding that plaintiff must produce "sufficient evidence to raise a genuine issue of material fact such as would permit a reasonable factfinder to conclude that [the employer] did not rely on its articulated reasons . . . *and* that [the employer] unlawfully discriminated against [plaintiff] because of his age").

Third Circuit (Pretext-only)

The Third Circuit has interpreted the Supreme Court's decision as allowing the trier of fact to infer the ultimate fact of discrimination from its disbelief of the employer's reason for its actions. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 2532 (1997); *see also Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994).

Fourth Circuit (Pretext-plus and pretext-only)

The Fourth Circuit properly followed *Hicks* in *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir.), *cert. denied*, 116 S. Ct. 380 (1995), finding that a plaintiff must prove both that the defendant's articulated reason for its action was false and that discrimination was the real reason. However, the Fourth Circuit has also held that a genuine issue of fact about the defendant's proffered reason can defeat a summary judgment motion. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310 (4th Cir. 1993).

Fifth Circuit (Pretext-plus)

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), the Fifth Circuit examined *Hicks* and concluded that

> a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer **and** (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. **The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.**

Id. at 994 (emphasis added); *See also Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993).

Seventh Circuit (Pretext-only)

The Seventh Circuit has seized upon the dicta in *Hicks* to find that summary judgment can be precluded by evidence that the employer's articulated reasons are false. *Perdomo v. Browner*, 67 F.3d 140 (7th Cir. 1995); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994).

Eighth Circuit (Pretext-plus, pretext-only, and pretext-maybe)

The Eighth Circuit is emblematic of the schizophrenic approach to this issue, with panels that have adopted pretext-plus, pretext-only, and pretext-maybe as the proper standard. In *Krenik v. County of LeSueur*, the court followed the *Hicks* decision and held as follows:

> To survive summary judgment at the third stage of the *McDonnell Douglas* analysis, a plaintiff must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext **and** that the real reason for its action was intentional discrimination.

Krenik, 47 F.3d 953, 958 (8th Cir. 1995) (emphasis added); *See also Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995); *Nelson v. Boatmen's Bancshares, Inc.* 26 F.3d 796, 801 (8th Cir. 1994).

However, In *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir.), *cert. denied*, 513 U.S. 946,

115 S. Ct. 355 (1994), the court espoused the pretext-only approach when it indicated that a plaintiff could prevail if the elements of a prima facie case are present and there is sufficient evidence to reject the employer's proffered reason. *See also Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994) (summary judgment can be overcome by producing evidence that would allow a reasonable jury to reject the defendant's proffered reasons).

The Eighth Circuit attempted to reconcile the pretext-plus and pretext-only cases in *Rothmeier v. Investment Advisers, Inc.*, by holding that

> an age discrimination plaintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. The second part of this test sometimes may be satisfied without additional evidence where the overall strength of the prima facie case and the evidence of pretext "suffice[s] to show intentional discrimination." The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiff's age.

Rothmeier, 85 F.3d 1328, 1336-37 (8th Cir. 1996). In subscribing to this pretext-maybe approach, the *Rothmeier* court recognized that pretext-only had clearly been rejected by *Hicks*, and that summary judgment for the employer is still proper absent sufficient evidence to infer discrimination:

> We believe that *Hicks* allows a trial judge to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trier of fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext. Intentional discrimination *vel non* is like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not.

Id. at 1335.

Ninth Circuit (Pretext-only, pretext-plus)

Even the Ninth Circuit is not immune from conflict. While the *Nidds* case, discussed above, has clearly adopted pretext-only, another panel suggested that pretext plus was the proper standard. The Ninth Circuit's most recent published decision regarding a plaintiff's burden in overcoming summary judgment in an employment discrimination case came in *Tarin v. County of Los Angeles*, 123 F.3d 1259 (9th Cir. 1997). In *Tarin*, the plaintiff claimed she did not receive a promotion because she was discriminated against on the basis of race and military service, and the employer countered that she was not

promoted because she received a failing score on her Appraisal of Promotability. Applying the *McDonnell-Douglas* burden shifting analysis, the Court assumed arguendo that the prima facie case was established, but held that the plaintiff had failed to establish pretext: "she failed to show that the [employer's] reasons for not promoting her were based on race." *Id.* at 1264. The Court went on to state that it **accepted** that the plaintiff was discriminated against on the basis of military service, which means the employee succeeded in establishing the falsity of the employer's stated reason. However, falsity proved to be insufficient: "There is simply nothing in the record to suggest animus on account of race." As such, the Court affirmed the District Court's dismissal of all claims of racial discrimination. *Id.* The *Tarin* court has clearly suggested that **both** falsity **and** discriminatory animus are necessary to withstand summary judgment.

Tenth Circuit (Pretext-plus, pretext-only, and pretext-maybe)

The Tenth Circuit has also weighed in on the pretext-plus side in an unpublished decision. *Card v. Hercules, Inc.*, 1993 WL 351337, 1993 U.S. App. LEXIS 21631 (10th Cir. 1993) (affirming summary judgment in favor of employer and describing the *Hicks* holding as follows: "the plaintiff cannot simply prove that the employer's proffered reasons for its action are false, but must offer evidence that the action was actually the result of unlawful discrimination"); *see also E.E.O.C. v. Flasher Co.*, 986 F.2d 1312, 1319 (10th Cir. 1992).

However, in *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the court defined "pretextual" as meaning

"unworthy of belief," which clearly does not incorporate the necessary element of discriminatory motive.

To further muddy the Tenth Circuit waters, the court in *Durham v. Xerox Corp.*, 18 F.3d 836 (10th Cir.) *cert. denied*, 513 U.S. 819, 115 S. Ct. 80 (1994), appears to adopt the fact-sensitive pretext-maybe approach, holding that disproof of the employer's reasons does not prove discrimination, but may permit the fact finder to infer discrimination to defeat summary judgment.

Eleventh Circuit (Pretext only)

In a remarkable misreading of the sharply-divided opinion in *Hicks*, the Eleventh Circuit found that the Supreme Court was unanimous that disbelief of the defendant's proffered reasons will support a finding of discrimination and preclude summary judgment. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, ___ S. Ct. ___, 1998 WL 6337 (1998).

D.C. Circuit (Pretext-maybe)

The D.C. Circuit's decisions provide that the fact finder may, if persuaded, find discrimination based on a rejection of the employer's proffered reason. *Kolstad v. American Dental Assoc.*, 108 F.3d 1431 (D.C. Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted in part*, 116 S. Ct. 805, *and cert. dismissed*, 116 S. Ct. 1037 (1996). This is consistent with the pretext-maybe approach.

The above is a detailed but non-exhaustive sampling of the decisions from the various Circuits. The inclusion of

the pretext-maybe category obviously clouds the picture, but also highlights the divergence of opinion. As one authority suggests,

> The best way of reconceiving the pretext-only/pretext-plus spectrum after Hicks, without getting confused by pretext-maybe, is to rate the courts' receptiveness to Hicks's permissive passage. The Second, Third, Seventh, Ninth, Eleventh, and District of Columbia Circuits have indicated receptiveness whereas the Fifth and Eighth have shown hostility. The First, Fourth, and Sixth Circuits also are hostile. The Tenth Circuit, however, seems friendly.[8]

The final tally, at least by this source's count, appears to be five Circuits that adhere to the pretext-plus approach, and seven Circuits that have failed to follow *Hicks* in varying degrees (from pretext-only to pretext-maybe). Even assuming arguendo that the *Hicks* opinion was equivocal as to whether pretext-plus or pretext-maybe was the proper standard, it is abundantly clear that pretext-only was flatly rejected.[9] Yet, for some reason, there are still Circuits that present pretext-only as a viable option, including the Ninth Circuit in this case. As such, this is obviously an issue that has fomented pointed disagreement among the Circuit

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[8] *Shifting Burdens*, 109 Harv. L. Rev. at 1593 n.89.

[9] *See, e.g.*, Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251, 1267 (1994).

Courts of Appeal, and it is necessary for the Supreme Court to resolve this conflict.

II. The Question Of Plaintiff's Burden In Establishing Pretext To Defeat Summary Judgment In An Employment Discrimination Case Is Of Exceptional Importance And Requires Uniform National Application.

Review by the Supreme Court is necessary because of the exceptional importance of the issue presented here: plaintiff's burden in establishing pretext to defeat summary judgment in an employment discrimination case. While *Hicks* appeared dispositive on this issue, there is, quite obviously, no national consensus regarding the proper standard to be applied. Employment discrimination is a burgeoning area of law, and both plaintiffs and defendants would benefit from a clarification of the burdens litigants face at the summary judgment stage. Therefore, Supreme Court analysis is clearly warranted.

III. The Ninth Circuit's Decision Conflicts With Other Circuit Court Case Law That Holds That A Supervisor's Disagreement With An Employer's Decision Does Not Create A Triable Issue Of Fact.

Even assuming arguendo that pretext-only is the proper standard, the Ninth Circuit's decision below was clearly erroneous and subject to Supreme Court review because Bleasdell could not even establish that NME's articulated reasons were false. As mentioned above, the Panel below relied exclusively on the declaration of Metz, Bleasdell's former supervisor, to find a triable issue of fact

as to whether NME's stated reasons for Bleasdell's termination were false. (App., *infra*, 8a-9a.) NME respectfully submits that the Panel's decision conflicts with sound case law that holds that a supervisor's disagreement with an employer's decision does not create a triable issue **unless the supervisor refutes the specific facts in the case**. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1460 (7th Cir. 1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994); *Williams v. Williams Elecs., Inc.*, 856 F.2d 920, 924 (7th Cir. 1988) (former supervisor's affidavit that plaintiff's performance was satisfactory and that her termination was the result of racial discrimination was insufficient to create a triable issue of fact as to whether the employer's performance-based explanation for termination was pretextual); *see generally Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989) (holding that conclusory allegations that are not backed up by statements of fact cannot defeat a motion for summary judgment).

In *Dey*, the plaintiff attempted to establish that her employer's articulated reasons for firing her were pretextual by introducing evidence that she was performing her duties adequately. *Dey*, 28 F.3d at 1460. However, the Seventh Circuit stated that such evidence is insufficient to create a triable issue of fact as to the employer's honest assessment of inadequate performance. The Court also noted that

> our cases also give little weight to statements by supervisors or co-workers that generally corroborate a plaintiff's own perception of satisfactory job performance. Such evidence . . . does not shed any light on whether the employer honestly based its

> employment decision on performance-related considerations, which is the focus of our inquiry in these cases.

Id. (citations omitted). The *Dey* court eventually found a triable issue, but only because the other evidence offered **refuted** the facts that allegedly supported the employer's claim of performance deficiencies. *Id.*

Based on the above, for Metz' declaration to carry any weight whatsoever, Metz would have to deny that the incidents supporting NME's honest assessment of inadequate performance ever took place. However, far from denying the incidents, Metz **admits** that the near-crashes occurred and that Bleasdell lied about one of them. He merely offers his opinion that the incidents should not have resulted in Bleasdell's termination. As such, Bleasdell has utterly failed to raise any triable issue as to the honesty of NME's reasons for terminating him. The inquiry here is not whether Metz **thinks** Bleasdell was a competent pilot - the only question is whether Metz is able to **refute** NME's reasons for firing Bleasdell. As the Seventh Circuit has repeatedly noted, "general averments of adequate performance are insufficient to create a factual issue on summary judgment." *Id.*

The facts in *Anderson* are remarkably on point. There, the employer advanced four incidents as evidence of inadequate performance that led to the plaintiff's termination. *Anderson*, 13 F.3d at 1124. The plaintiff argued that these incidents were merely a pretext for age discrimination, and introduced the declaration of his supervisor as evidence of adequate performance. *Id.* Like Metz, the supervisor did not dispute that the incidents did,

in fact, occur. *Id.* The supervisor merely stated, as Metz did, that he did not believe the plaintiff was fired for performance inadequacies. *Id.* at 1124-25. The Seventh Circuit flatly rejected this evidence, finding that it was insufficient to create a genuine issue of fact: "[the plaintiff] has failed to show that [the employer] lied by claiming that he was fired for performance reasons." *Id.* at 1125.

Similarly, Bleasdell has failed to raise a triable issue of fact here: Metz did not dispute that the incidents occurred; he merely stated that he does not think Bleasdell was fired for these performance inadequacies. Therefore, NME is entitled to judgment as a matter of law, and the Ninth Circuit should have affirmed the district court's decision. The Ninth Circuit's decision is clearly erroneous, and it conflicts with other Circuit Court case law in this regard. As such, Supreme Court review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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